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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL LOPEZ,

Defendant and Appellant.

H029029

(Monterey County
Super. Ct. No. SS043204)

Following the denial of his motion to suppress evidence, appellant pleaded guilty to one count of possession of a machine gun, admitting the allegations of a street gang enhancement, and one count of transportation of marijuana. (Pen. Code, §§ 1538.5, 12220, subd. (a), 186.22, subd. (b)(1), Health & Saf. Code, § 11360, subd. (a).) As part of this plea agreement, the remaining counts charged against appellant were dismissed and he was sentenced to five years in state prison. Appellant contends that the trial court erred in denying his motion to suppress evidence. We affirm.

Trial Court Proceedings

At the hearing on appellant's motion to suppress evidence, Police Officer Wayne Vance testified that he had worked for the City of Salinas Police Department for 19 years, including two years with the gang task force. In December 2004, shortly after midnight, he saw a 1988 Chrysler run a stop sign. When he stopped the car he found that appellant

was the driver and that there were two passengers, Murrillo in the front passenger seat and Puga sitting behind the driver. Officer Vance recognized Puga. He testified, "I had arrested him on previous occasions. Also through my gang experience and the side of town I worked on, I've been working there for 15 years in the Heburn Street area." He knew that Puga was a member of the Heburn Street gang and that he had been committed to the California Youth Authority. On the floor of the car just to Puga's right was an open beer can.

In response to Officer Vance's questions, appellant said that he had been discharged from parole and that he had run the stop sign because his brakes had failed. When asked for his license, registration, and proof of insurance, appellant produced his drivers license and, explaining that he had very recently bought the Chrysler, a partially completed temporary registration form that was for a 1970 Ford. The keys were in the ignition.

Vance testified that he smelled alcohol on appellant's breath and that appellant's eyes were glassy and bloodshot. Appellant did not perform well on the field sobriety tests. Vance placed appellant under arrest for driving under the influence and handcuffed him. When appellant then passed a field breath test and explained that his performance on the field sobriety tests was due to a medical condition, Vance decided to release appellant. He told appellant to wait on the sidewalk and turned his attention to the passengers.

By this time, Officer Vance's back-up, Officers Stewart and Livingston, had arrived. Officer Stewart contacted Murrillo and told Vance that Murrillo was currently on probation "with search and seizure with gang terms or no-gang-association." Murrillo had "HBN" tattooed on his stomach, referring to the Heburn Street Gang. Officer Vance determined that Murrillo was in violation of the no-gang-association clause of his probation and had him wait on the sidewalk. Puga had an outstanding arrest warrant.

When the officers had Puga get out of the car, Vance saw that the beer can had been smashed and pushed under the passenger seat. Puga was placed in a patrol car.

When asked by Vance for permission to search the car, appellant initially said, "Go ahead." As Vance began to walk toward the car, appellant withdrew his consent and Vance told him "I'm going to search it anyway." Vance and Livingston searched the interior of the car and found an empty clip-on holster on the floorboard by the driver's seat. Vance testified that he asked appellant about the holster and that "[appellant] first stated that it was for a toy." Based on Vance's training and experience, he believed it was a "regular holster" for a "true firearm."

Vance decided to search the trunk of the car. He explained at the motion to suppress, "Based on the fact that I have two gang members that I've confirmed now, I already knew one was a gang member. The second one, his probationary record. The fact that I know it's a crime for gang members to have concealed weapons. Based on 12025^[1], that's the reason that I searched the trunk. That was my main – I was aware of the felony, but that wasn't – that was an outside factor. That was not what I was thinking at the time. I was thinking, 'I have two gang bangers, and I'm going to check for that gun.' "

In his motion to suppress evidence, appellant said that, inside the trunk, officers found "an alleged machine gun, approximately 2.5 pounds of alleged marijuana inside a black backpack, and various caliber bullets inside the backpack. There was also an eighteen pack of Budweiser beer in the trunk, with nine cans remaining." In a second search of the passenger compartment the officers found a .357 bullet and in a search

¹ Penal Code section 12025 provides in part: "(a) A person is guilty of carrying a concealed firearm when he or she does any of the following: [¶] (1) Carries concealed within any vehicle which is under his or her control or direction any pistol, revolver, or other firearm capable of being concealed upon the person. . . . [¶] (3) Causes to be carried concealed within any vehicle in which he or she is an occupant any pistol, revolver, or other firearm capable of being concealed upon the person."

incident to appellant's arrest they found a baggie of methamphetamine in appellant's wallet.

The trial court denied the motion to suppress. After describing a number of cases involving vehicle searches, the court concluded: "One, you find a holster. There's a weapon. Two, you have an open container of alcohol. You need to find all the alcohol as well."

Discussion

On appeal from the denial of a motion to suppress evidence, our standard of review is settled. In ruling on a motion to suppress, "the superior court sits as a finder of fact with the power to judge credibility, resolve conflicts, weigh evidence, and draw inferences, and hence . . . on review of its ruling by appeal or writ all presumptions are drawn in favor of the factual determinations of the superior court and the appellate court must uphold the superior court's express or implied findings if they are supported by substantial evidence. [Citation.]" (*People v. Laiwa* (1983) 34 Cal.3d 711, 718; *People v. Glaser* (1995) 11 Cal.4th 354, 362; see also *Ornelas v. United States* (1996) 517 U.S. 690, 699.) However, "[i]n determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]" (*People v. Glaser, supra*, 11 Cal.4th at p. 362; see also *Ornelas v. United States, supra*, 517 U.S. at p. 699.)

The Fourth Amendment requires a warrant to search unless an exception applies. (*Katz v. United States* (1967) 389 U.S. 347, 357.) Because of the auto's mobility, an officer may search the vehicle without a warrant if the officer has probable cause to believe it contains contraband or evidence. (*United States v. Ross* (1982) 456 U.S. 798.) "In this class of cases, a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained." (*Id.* at p. 809, fn. omitted.) "In other words, the police may search without a warrant if their search is supported by probable cause." (*California v. Acevedo* (1991) 500 U.S. 565, 579.)

"The scope of a warrantless search based on probable cause is no narrower--and no broader--than the scope of a search authorized by a warrant supported by probable cause." (*United States v. Ross, supra*, 456 U.S. at p. 823.) "[A] warrantless search of an automobile, based upon probable cause to believe that the vehicle contained evidence of crime in the light of an exigency arising out of the likely disappearance of the vehicle, [does] not contravene the Warrant Clause of the Fourth Amendment." (*California v. Acevedo, supra*, 500 U.S. at p. 569, citing *Carroll v. United States* (1925) 267 U.S. 132, 158-159.) "The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained." (*California v. Acevedo, supra*, 500 U.S. at p. 580.)

Appellant observes, "Officer Vance searched the passenger compartment of the car based on the open container, Murrillo's search waiver, and the arrest of Puga under the outstanding arrest warrant. However, it was not until Livingston discovered the empty holster that Vance determined there was probable cause to search the trunk as well." Appellant argues, "mere gang membership, unrelated to specifically identified conduct on the gang member's part is not sufficient to justify a reasonable belief that the trunk of the car in which the gang members are driving contains a gun." "The presence of two gang members in the car, both of whom were behaving lawfully, should not form the basis for a finding of probable cause to search the trunk, any more than the presence of two ordinary citizens not subjected to the stigma of the gang label." "[T]he fact that Murrillo and Puga were gang members does not, in logic, lead to the conclusion that a gun fitting the holster would be likely to be found in the trunk. . . . If Murrillo and Puga were gang members engaged in illegal activity on behalf of a gang, the more reasonable inference is that the holster would not be empty. They would keep the weapon nearby and accessible so that it could be used for offensive or defensive gang purposes."

As they did in the trial court, the parties discuss the applicability of *United States v. Spencer* (9th Cir. 1992) 1 F.3d 742, 746. In *Spencer*, police officers stopped a vehicle

which was being driven at 1:00 a.m. without functioning headlights. The driver was not able to produce her license and said that the car belonged to a friend. The license plate was not registered to that vehicle. The defendant, who was a passenger, bent forward in his seat. When asked for identification, he produced a jail identification card and a computer check revealed that he had been convicted of assault with a deadly weapon. Another arriving officer said that, the night before, he had seen the vehicle being driven by someone else and that different license plates had been on it. The officers asked the driver and the defendant to step out of the car. The defendant was wearing a heavy leather coat, so an officer patted him down and discovered that he was wearing an empty shoulder holster. An officer then searched the interior of the car and discovered a .44 caliber revolver. The Ninth Circuit concluded that the District Court had properly overruled the defendant's motion to suppress the weapon.

Appellant argues that *Spencer* "suggests that there must be something more than mere presence of an empty holster to justify a warrantless search." We have no quarrel with this reading of *Spencer*. However, although acknowledging that the court must look to the totality of the circumstances to determine if there was probable cause to search the trunk, appellant parses the circumstances here into discrete units and argues that each does not amount to probable cause. We see much more than the mere presence of an empty holster to support probable cause to search the trunk in this case. Vance knew from his experience that the holster found in the search of the interior of the car was for a real gun, yet appellant said it was for a toy gun. This deception makes the circumstances more suspicious than in *Spencer*, where the passenger was simply wearing the shoulder holster. Furthermore, the gang members were not "behaving lawfully" as appellant argues. Murrillo was in violation of his non-association probation condition by traveling with Puga that night. That probation condition is directed at curbing the unlawful activity that ensues when gang members congregate. As the court observed in *People v. Lopez* (1998) 66 Cal.App.4th 615, "[a]ssociation with gang members is the first step to

involvement in gang activity.' " (*Id.* at p. 624.) Puga was not just a gang member, but a gang member with an outstanding warrant, a gang member with an open container of alcohol in a moving car, and a member of the same gang as Murrillo. It appears that he attempted hide the beer can from the officer by smashing it and shoving it under the seat while he was still in the back seat. The totality of the circumstances, including these deceptions and law violations by known gang members, with the presence of the holster but no gun in the passenger compartment, was sufficient to justify a reasonable belief that a firearm fitting the holster would be likely to be found in the trunk of the car. The trial court properly denied appellant's motion to suppress.²

² In light of our disposition, we do not resolve respondent's contention that the items in the trunk would have been discovered inevitably. Respondent argues that, after the officers discovered the .357 bullet in the second search of the passenger compartment, appellant would have been arrested for being a felon in possession of ammunition (Pen. Code, § 12316, subd. (b)(1).) The car would have been impounded and the contents of the trunk inventoried. Respondent admits "no evidence was entered regarding Officer Vance's or the Salinas Police Department's practices and procedures regarding arrests and inventory searches." This is because the prosecution did not seek admission of the evidence under this theory in the trial court, and thus, appellant did not develop the record to address this new justification for the seizure.

Disposition

The judgment is affirmed.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.